



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG

Docket No: 84-99

1 December 1999

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 30 November 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by Headquarters Marine Corps dated 2 August and 27 August 1999, copies of which are enclosed and the rebuttal thereto dated 4 October 1999.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070
JAM4
27 AUG 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]
[REDACTED] U.S. MARINE CORPS

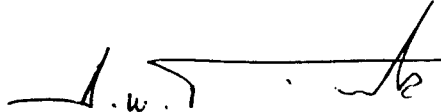
Ref: (a) Dir PMD memo 1910 MMSR-3 of 24 Mar 97
(b) ASN(M&RA) end of 16 Apr 97 on Dir PMD memo 1910 MMSR-3
of 24 Mar 97
(c) MMSR memo 1741 MMSR-6 of 2 Aug 99

Encl: (1) SJA to CMC COMMENT 1900 JA-2 of 11 Mar 97

1. We are asked to provide an opinion regarding Petitioner's request that his discharge *under other than honorable conditions* be removed from his official records.
2. We recommend that relief be denied. Our analysis follows.
3. Background. On 17 May 1997, Petitioner was discharged from the U.S. Marine Corps, pursuant to the findings and recommendations of an administrative discharge board, for the commission of a serious offense. References (a) and (b) reveal that, in accordance with the recommendation of Director, Personnel Management Division, Petitioner's discharge *under other than honorable conditions* was approved by the Assistant Secretary of the Navy (Manpower and Reserve Affairs) on 16 April 1997.
4. Analysis. Enclosure (1) reveals that all issues raised by Petitioner in this petition were previously addressed by the Staff Judge Advocate to the Commandant of the Marine Corps. The Assistant Secretary of the Navy considered these issues, and his approval of Petitioner's discharge *under other than honorable conditions* reflects his determination that the issues were without merit. Petitioner provides no evidence not previously considered by proper authority, and provides no reason to disturb the findings of the Assistant Secretary of the Navy.

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IN THE CASE OF [REDACTED]
[REDACTED] U.S. MARINE CORPS

5. Conclusion. Accordingly, for the reasons set forth above, we concur with the recommendation of Head, Separation and Retirement Branch (reference (c)), and recommend that the requested relief be denied.



H. W. FRANK
Acting Head
Military Law Branch
Judge Advocate Division

1900
JA-2
11 Mar 97

SJA TO CMC COMMENT on MMSR-3 r/s of 16 Oct 96

Subj: ADMINISTRATIVE SEPARATION OF [REDACTED]
[REDACTED] USMC

Ref: (a) MARCORSEPMAN
(b) Telecopy, [REDACTED] ltr of 7 Oct 96 w/encl &
end
(c) CO, MTACS-28 ltr 1910 17/12 of 28 Feb 97 w/end

1. Per reference (a), the proceedings have been reviewed by a judge advocate and are sufficient in law and fact. This case was held in abeyance pending receipt of references (b) and (c), which should be incorporated into the proceedings.

2. This processing is based upon a special court-martial conviction for fraternizing with a female private first class and soliciting her to commit adultery (SNM is married). The court did not adjudge a punitive discharge.

3. The respondent was notified that he was being processed for separation under the general and specific bases of "misconduct/commission of a serious offense." The administrative board which considered this case initially recommended that the respondent be separated under other than honorable conditions (UOHC) due to "misconduct/pattern of misconduct" based upon fraternization. This recommendation is contrary to the mandates of reference (a); a board is required to submit findings and recommendations based upon the matters of which a respondent has been notified. Seven days after returning their first set of findings and recommendations, the board reconvened over the objection of counsel for the respondent. Following further deliberations, the board recommended separation UOHC due to "misconduct/commission of a serious offense" based upon violations of Articles 92 and 134, UCMJ.

4. All commanders recommend separation UOHC.

5. The respondent and his counsel have submitted additional documents for consideration (reference (b)). In addition to matters noted in paragraph 3 of this comment, respondent's counsel alleges the following substantive or procedural errors:

a. Ten months passed between the court-martial and the administrative board.

b. Although processing was based upon the court-martial, all government witnesses testified concerning matters unrelated to

Subj: ADMINISTRATIVE SEPARATION OF [REDACTED]
[REDACTED] USMC

the court, of which the respondent had not been notified, and which constituted "Red Herring[s]." The board was "confused and improperly considered the irrelevant material."

c. The "unrelated" misconduct was alleged fraternization occurring in January 1996 (seven months after the court-martial), for which the respondent received a "6105" counseling entry in his service record. No evidence was presented that the respondent violated that 6105 counseling.

d. The testimony of government witnesses concerning the events of January 1996 was contradictory, and should not be believed due to the "self-serving motivation of the witnesses to lie."

e. The use of the court-martial for processing was "simply a subterfuge. * * * The command realized that they could not discharge based on a pattern of misconduct, because they had not met the requirements of the reference. Therefore, they have attempted to present a pattern of misconduct and use the court as the reason."

6. Concerning the issues raised by the respondent's counsel:

a. While a 10-month delay is not desirable, it does nothing to invalidate the proceedings under reference (a).

b. Characterization of service is based upon the quality of the respondent's service during the *entire* enlistment, and a board appropriately receives all such testimony. If this were not the case, many counsel would be barred from presenting their most persuasive (or only) evidence - that which shows how well a respondent has performed *subsequent* to the acts which form the basis for processing. That the respondent's subsequent conduct may be viewed in an unfavorable light does not thereby disqualify it from consideration.

c. Respondent's counsel impugns the motives of both the command and witnesses appearing at the board, without providing any factual foundation. Such statements should be summarily dismissed.

d. The board initially failed to submit findings and recommendations conforming to the parameters of reference (a). The second session of this board was the appropriate forum and method for ensuring that the board's report was in compliance with reference (a).

Subj: ADMINISTRATIVE SEPARATION OF [REDACTED]
[REDACTED] USMC

7. In addition to the preceding, we note that government exhibit 2 contains the record of a nonjudicial punishment in 1984 for failure to be at an appointed place of duty, and for disobedience of orders related to a morning cleanup. Under paragraph 1004.4a of reference (a), prior service activities may not be considered on the issue of characterization. Despite this, the board report states that "all evidence was considered on the issue of characterization."

8. For the reasons stated below, we do not consider this to be prejudicial to the substantial rights of the respondent:

a. The nonjudicial punishment occurred in the remote past; at the time, the respondent was two grades junior to his present grade; and the incident involved minor offenses entirely different in nature from the conduct which forms the basis for separation processing. Therefore, it is quite unlikely that this material played any significant part in determining the recommended characterization.

b. The respondent's counsel has noted no objection concerning this particular issue.

c. The separation authority will not consider prior service activities in determining the characterization of service, and the final record of proceedings may be annotated accordingly.

9. Only the Secretary of the Navy may approve separation UOHC in this case. Therefore, the Commandant has the following options:

a. Forward the case to the Secretary recommending separation UOHC (with or without suspension);

b. Direct separation with an honorable or a general (under honorable conditions) characterization of service (with or without suspension);

c. Direct retention.

Drafted by: [REDACTED]

B. T. PALMER
By direction

ENCLOSURE (1)



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:


1741
MMSR-6
2 Aug 99

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF FORMER [REDACTED]
[REDACTED] USMC

Ref: (a) MMER Route Sheet of 24Jun99, Docket No. 0084-99

1. The reference requests an advisory opinion on former [REDACTED]
[REDACTED]' petition to correct his record to show that he
was not discharged "under other than honorable conditions" on
17 May 1997.
2. Former [REDACTED] was discharged for commission of
a serious offense by proper authority. Regrettably, we therefore
cannot recommend that his petition be granted favorable
consideration.
3. We suggest that his petition be routed to the Legal Branch
of this Headquarters for further advisory opinion.
4. Point of contact is Mr. [REDACTED], MMSR-6, [REDACTED]


J. P. RATHBUN, JR.
Head, Separation and
Retirement Branch
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG:jdh
Docket No: 84-99
2 December 1999

[REDACTED]

Dear Mr. [REDACTED]

This is in reference to your interest, as attorney, in the case of Mr. [REDACTED]

Enclosed is a copy of a letter to [REDACTED] informing him that his application has been denied. It is requested that you transmit the denial letter to him, a copy of which is enclosed for your records.

It is regretted that a more favorable reply cannot be made.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures